FILE COPY

Office-Supreme Court, U.S.
FILED
APR 1 1970
JOHN F. DAVIS, CLERK

No. 1381

In the
Supreme Court of the United States
OCTOBER TERM, 1969

CLARENCE W. HENDRICKSON,
Petitioner,

vs.

STATE OF INDIANA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE INDIANA SUPREME COURT

DEAN E. RICHARDS
DEWITT, RICHARDS & MANAHAN
155 East Market Street
609 Union Title Building
Indianapolis, Indiana 46204
Attorney for Petitioner

The Scheffer Press, Inc., 118 South Clinton Street, Chicago, Illinois

TABLE OF CONTENTS

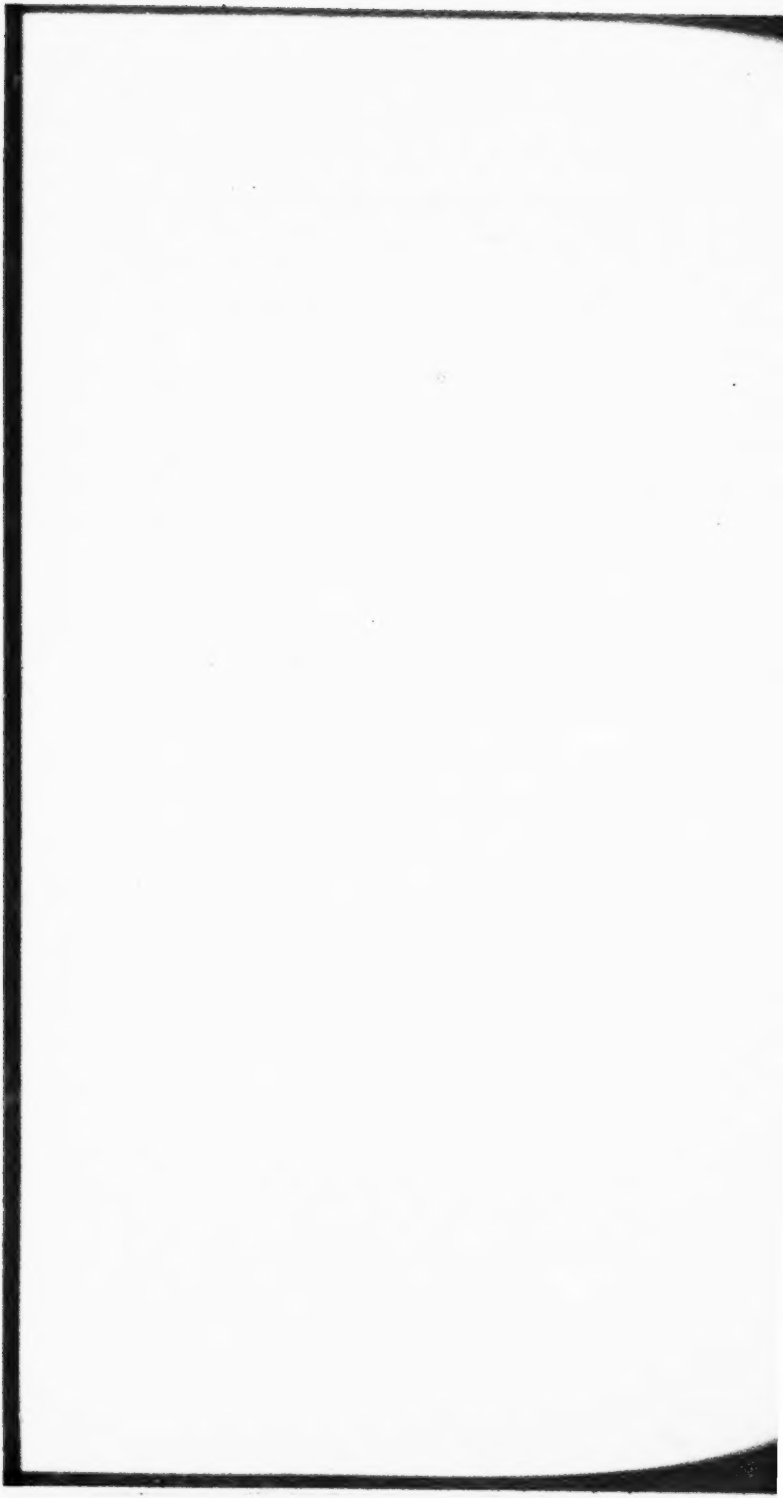
	PAGE
Opinion	1
Jurisdiction	1
Questions Presented	2
Statement of the Case	2
Reasons for Granting Writ	4
Conclusion	5

Case Authorities

Fields v. State, 134 Ind 46, ... N.E. ..... (1946)	8
Rhodes v. State, 224 Ind 569, 70 N.E. 2nd 27 (1946)	7
Baker v. State, 236 Ind 55, 138 N.E. 2nd 641 (1956)	7
Riggs v. State, 237 Ind 629, 147 N.E. 2nd (1957)	7

Contents of Appendix

Opinion of the Supreme Court of Indiana	1a



IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No.

CLARENCE W. HENDRICKSON,

Petitioner.

vs.

STATE OF INDIANA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE INDIANA SUPREME COURT

To The Chief Justice Of The United States And The Associate Justices Of The United States Supreme Court:

The Petitioner, Clarence W. Hendrickson, prays that a Writ of Certiorari issue to review the judgment of the Indiana Supreme Court in the above case.

OPINION BELOW

The opinion below is reported at 254 N.E.2d 331 and is printed in the appendix to this petition.

JURISDICTION

The judgment of the court below was entered on February 6, 1969. A timely petition for rehearing was filed and rehearing was denied on March 5, 1970. The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1257(3).

QUESTIONS PRESENTED

1. Can the state impose the burden of proving a negative upon a criminal defendant in creating an exception constituting a defense in a criminal statute.

2. May the state convict and incarcerate a criminal defendant where at his trial the indictment charged him with the unlawful collection, under color of his public office, a specific corporate account while the evidence would show the money collected was for a different corporate account.

STATEMENT OF THE CASE

The petitioner was convicted on January 24, 1969, and the charge was that of Receiving Unlawful Remuneration; in receiving the sum of two hundred eighty seven dollars and twenty five cents ($287.25) from Interstate Ice, Inc. upon a collection made upon an account due Interstate Ice, Inc. Which said acts by defendant were not a part of his official duties as justice of the peace; the petitioner was sentenced on February 6, 1969 receiving one (1) year prison term and a one thousand dollar ($1,000.00) fine and costs.

Immediately prior to petitioner's trial, he filed a Motion To Quash The Indictment and a Motion To Strike Certain Averments, which were overruled. The Indictment read as follows:

"The Grand Jury for the County of Marion in the State of Indiana, upon their oath do present that Clarence Hendrickson on or about the 11th day of July, A.D. 1967, at and in the County of Marion and in the State of Indiana, then and there being the duly elected and qualified Justice of Peace in and for Perry Township, in

Marion County, Indiana, unlawfully agreed to collect a certain account due Interstate Ice, Inc., a corporation, from Michael Maio, in the amount of Five Hundred Seventy-four and 50/100 ($574.50), and under color of his office caused to be issued and served upon the said Michael Maio and one Alice Field summonses purporting to be issued in Cause Numbers 0506 and 0507 of the Perry Township Justice of Peace Court entitled *Indpls. Coal & Oil Co.* v. *Michael Maio And Alice Field* and directing the said Michael Maio and Alice Field to appear in said Justice of Peace Court; that thereafter said account in the sum of Five Hundred Seventy-four and 50/100 was paid by the said Michael Maio and the said Clarence Hendrickson, Justice of Peace on or about the 26th Day of July, 1967, unlawfully received the sum of Two Hundred Eighty-seven And 25/100 Dollars ($287.25) from said Interstate Ice, Inc., a corporation, for said collection of the said sum of Five Hundred Seventy-four And 50/100 Dollars ($574.50); that said acts by the defendant were not a part of defendant's official duties as said Justice of Peace nor authorized by law, then and there being contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Indiana."

That the Court said pertaining to the variance the following:

> "At most we can only say there was some conflict in the evidence, and this was resolved by the trier of the facts. Certainly the appellant was not misled by the allegations in the indictment nor is there any showing that he was harmed in any fashion, since the proof conformed to the charge."

REASONS FOR GRANTING WRIT

Two reasons are presented: (1) That the petitioner was denied due process because he was convicted where there was a vital variance between evidence at the trial and the indictment; (2) The state imposed a burden of proving a negative upon the defendant in creating an exception constituting a defense in statute under which he was convicted.

I.

WHETHER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT PERMITS A VITAL VARIANCE BETWEEN THE INDICTMENT AND THE EVIDENCE PRESENTED AT THE TRIAL. THE INDICTMENT CHARGED THE PETITIONER WITH RECEIVING REMUNERATION FOR COLLECTION OF AN ACCOUNT DUE INTERSTATE ICE, INC. WHILE THE TESTIMONY CLEARLY SHOWED THE ACCOUNT WAS DUE TO POLAR ICE, INC., THUS THERE IS A VITAL VARIANCE BETWEEN THE INDICTMENT AND EVIDENCE PRESENTED.

The indictment in this cause charges the petitioner, while acting under the color of his office as a justice of peace agreeing to collect a certain account due Interstate Ice, Inc. from Michael Maio under the cause numbers of the Perry Township Justice of Peace Court entitled Indianapolis Coal & Oil versus Michael Maio and Alice Field and that thereafter, Michael Maio paid Five Hundred Seventy-four Dollars ($574.00) to Interstate Ice, Inc. and that Interstate Ice, Inc. paid to the petitioner Two Hundred Eighty-Seven and 25/100 ($287.25) Dollars for collection of said account.

The evidence at the trial showed that there were 3 corporations involved, Polar Ice and Fuel Company, now Polar Ice, Inc., the Indianapolis Coal & Oil and Interstate Ice, Inc. No where in the opinion in the lower court is Polar Ice, Inc. mentioned although the state witness, Maio,

BLEED THROUGH POOR COPY

testified that he owed the account to Polar Ice, Inc. and not Interstate Ice, Inc.[1] The evidence at the trial shows that the state's witness Schultz and Sexton's testimony as to the ownership of the account, was purely hearsay and that the shop book entries would have been the only proper method of proof of the ownership of the account.[2] Also,

---

[1] Q. I will ask you of several years ago you incurred an account with Interstate Ice, Inc. in the sum of Five Hundred Seventy-four And 50/100 Dollars ($574.50)? A. I believe at the time it was Polar Ice, sir.

[2] Q. Isn't it a fact that the Polar Ice and Fuel is the real owner of that place where Michael Maio and Alice Fields got their ice? A. The real owner of what?
Q. Of the place that delivered the ice. Wasn't it the Polar Ice and Fuel plant? A. I don't know what—plant it comes from, it comes from all plants. A. Where did the ice come from.
Q. Yes, what company did the ice come from that the creditors, Maio and Fields purchased from what company? A. You mean what company produced the ice?
Q. Yes. A. I don't know sir.
Q. Now, isn't it a fact that there is some kind of an interlocking agreement or corporate agreement between the Polar Ice and Interstate Ice, isn't there? A. The Polar Ice and Interstate Ice?
Q. Yes, isn't there? A. In Indianapolis, yes.
Q. They are all affiliated together aren't they?
A. Well, I don't know.
Q. Isn't that the reason the account of Alice Field and Michael Maio was at the Polar Ice because Polar Ice and Fuel was the real party in interest? (Objection by Mr. Bath that real party in interest carries a legal meaning and objection sustained because it calls for a conclusion.)
Q. Are you an officer in the Polar Ice and Fuel Company? A. No, sir.
Q. Well, what is the working agreement then or the relationship between Interstate Ice, Polar Ice and the other corporation that you mentioned, Indianapolis Coal and Oil? A. Interstate is a company that delivered ice to wholesale places, railroads, and state fairs, and they bought the ice from Polar or Indianapolis Ice.

that the mere fact that the account was received by Interstate Ice, Inc. and the check given by Interstate Ice, Inc. to the petitioner is not conclusive of the offense charged.

---

[1] (Continued)

Q. Who bought the ice, Interstate? A. Interstate did; that Corporation bought it from either one of the others.

Q. Now do you have the invoice on that purchase of Maio and Fields? A. Made out to them?

Q. Yes? A. *I don't know whether they do nor not.*

Q. Well, how do you know then that this particular transaction was made between Interstate Ice and Maio and Fields, how do you know that? A. How do I know?

Q. Yes. A. That Maio got the ice from Interstate?

Q. Yes, how do you know? A. *Well, I had the tickets probably.*

Q. Probably. Where is the ticket? A. Well, they were charged up at the bookkeeper office.

Q. Well, have you got the records with you? A. No, I don't.

Q. Then you know of your own knowledge now that the transaction concurred between Alice Fields and Michael Maio with Interstate Ice, you know that of your own knowledge, is that right? A. That's right.

Q. You know then? A. That they bought the ice from Interstate?

Q. Yes. A. Yes.

Q. Now, Mrs. Schmalz, in the early part of 1967, did a delinquent account by the name of Michael Maio come to your attention? A. Yes sir.

Q. Do, you recall the amount of that account?

A. Something around five hundred and seventy some dollars, seventy four dollars, something like that.

• • •

Q. Now, who was that account owed to Mrs. Schmalz?

A. Interstate Ice.

Q. And what efforts were made to collect that amount?

A. Well, they had tried to contact Mr. Maio several times and talked to his bookkeeper.

Q. Did these collection efforts produce any collection?

A. No sir.

Q. Now following that, what, if anything, did you do with the account towards collection? A. It was turned over to Robert Sexson.

BLEED THROUGH POOR COPY

The indictment clearly charges the petitioner with receiving renumerations which is alleged to be unlawful for work done in the collection of an account *due* Interstate Ice, Inc. and therefore, it was necessary for the State to prove that the account belonged to Interstate Ice, Inc. That the State did not except by hearsay evidence of the officers of Interstate Ice, Inc. when the account supposedly collected belonged to the Indianapolis Coal & Oil Inc. or Polar Ice, Inc. according to the document and the testimony of Michael Maio. Thus, the material allegations of the indictment was not proven beyond a reasonable doubt, when such variance in the evidence is apparent. *Rhoades* v. *State,* 224 Ind 569, 70 NE2d 27 (1946); *Baker* v. *State,* 236 Ind 55, 138 NE2d 641 (1956); *Riggs* v. *State,* 237 Ind 629, 147 NE2d (1957).

II.

WHETHER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT PERMITS A STATE TO IMPOSE THE BURDEN OF PROVING A NEGATIVE UPON A CRIMINAL DEFENDANT IN CREATING AN EXCEPTION CONSTITUTING A DEFENSE IN A CRIMINAL STATUTE.

The defendant in this cause was charged in such a manner as to describe his conduct as legal and then to characterize it as illegal with the use of the adjective "unlawfully" and no other explanation. This imposed upon the petitioner the burden of proving that the conduct described was illegal in no particular when the trial court approved the language of the indictment by its denial of the petitioner's motion to quash.

What the indictment charges is the institution of a cause against Michael Maio and Alice Field by the Indianapolis Coal and Oil Co. directing them to appear, and the form of summons required by sec. 5-1601 Burns requires the

Justice of Peace to cause the issuance of the same, and no such causing the issuance can be described as outside of the official duties, and not authorized by law.

Thus, what the indictment describes an act within the official duties of a Justice of Peace, and then says such act is outside of the official duties and not authorized by law. An indictment cannot describe a legal act and call it an illegal act, for it has to be one thing or the other.

This is equal to pleading of a negative pregnant, that is to allege a legal act, and then denominate it an illegal act. *Fields* v. *State*, (1892) 134 Ind. 46.

CONCLUSION

For the reasons given it is respectfully submitted that the decision of the Indiana Supreme Court should be reversed upon a granting of certiorari herein and the said relief is hereby prayed for.

DEAN E. RICHARDS
Attorney for Petitioner

APPENDIX

Clarence W. Hendrickson, Appellant,

v.

State of Indiana, Appellee.

No. 569 S 123.

Supreme Court of Indiana.

Jan. 22, 1970.

Arterburn, Judge.

This is a criminal prosecution instituted by an indictment in two counts. Count I of the indictment reads as follows:

"The Grand Jury for the County of Marion in the State of Indiana, upon their oath do present that Clarence Hendrickson on or about the 11th day of July, A.D.1967, at and in the County of Marion and in the state of Indiana, then and there being the duly elected and qualified Justice of Peace in and for Perry Township in Marion County, Indiana, unlawfully agreed to collect a certain account due Interstate Ice, Inc., a corporation, from Michael Maio, in the amount of Five Hundred Seventy-four and 50/100 Dollars ($574.50) and under color of his office caused to be issued and served upon the said Michael Maio and one Alice Field summonses purporting to be issued in Cause Numbers 0506 and 0507 of the Perry Township Justice of Peace Court entitled Indpls. Coal & Oil Co. vs. Michael Maio and Alice Field and directing the said Michael Maio and Alice Field to appear in said Justice of Peace Court; that thereafter said account in the sum of Five Hundred Seventy-four and 50/100 Dollars ($574.50) was paid by the said Michael Maio and the said Clarence Hendrickson, Justice of Peace on or about the 26th Day of July, 1967, unlawfully received the sum

of Two Hundred Eighty-seven And 25/100 Dollars ($287.25) from said Interstate Ice, Inc., a corporation, for said collection of the said sum of Five Hundred Seventy-four And 50/100 Dollars ($574.50); that said acts by the defendant were not a part of defendant's official duties as said Justice of the Peace nor authorized by law, then and there being contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Indiana." (emphasis added)

Count II of the indictment reads as follows:

"The Grand Jurors aforesaid, upon their oaths aforesaid, do further present that Clarence W. Hendrickson, on or about the 11th day of July, A.D., 1967, at and in the County of Marion and the State of Indiana, then and there being the judge of a court of the State of Indiana, to-wit: the elected and qualified Justice of Peace in and for Perry Township, in Marion County, Indiana, did unlawfully engage in the business of collecting claims in that he agreed to collect a certain account due Interstate Ice, Inc., a corporation, from Michael Maio in the amount of Five Hundred Seventy-four and 50/100 Dollars ($574.50) and under color of his office caused to be issued and served upon the said Michael Maio and on Alice Field summonses purporting to be issued in Cause Numbers 0506 and 0507 of the Perry Township Justice of the Peace Court entitled Indpls. Coal & Oil Co. vs. Michael Maio And Alice Field, and directing the said Michael Maio And Alice Field to appear in said Justice of Peace Court; that thereafter said account in the sum of Five Hundred Seventy-four and 50/100 ($574.50) was paid by the said Michael Maio, and the said Clarence Hendrickson, Justice of the Peace, on or about the 26th day of July, 1969, unlawfully received the sum of Two Hundred Eighty-seven and 25/100 Dollars ($287.25) for collecting said account, then and there being contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Indiana". (emphasis added)

Appellant was found guilty upon both counts by the trial court.

As can be noted from the above quoted indictment, appellant, in his capacity as justice of peace, was charged with issuing summonses purporting to be issued in causes docketed in the Perry Township Justice of the Peace Court against debtors of Interstate Ice, Inc. In response to said summonses the overdue debt was paid and appellant is changed with receiving one-half of the amount so paid.

Appellant's first contention refers to count one of the indictment. Count one is based upon Burns' Ind. Stat. Anno. § 10-3729 which reads in pertinent part as follows:

"It shall be unlawful for any justice of the peace to receive directly or indirectly any remuneration or thing of value from any litigant or any one on behalf of such litigant in any pending cause in his court except for costs and fees provided by law, or to receive any remuneration or any thing of value from any one for doing any act under color of his office which act is not a part of his official duties nor authorized by law * * *"

[1] Appellant argues that his conduct in issuing the summonses was not an act done "under color of his office which act is not a part of the official duties nor authorized by law". Of course, the issuance of a summons by a justice of the peace is authorized by law where a complaint is filed or action et seq. In this case the evidence clearly shows that the summonses were issued with no complaint being filed and no cause actually docketed. The summonses issued by the appellant were in furtherance of an unlawful objective and not authorized. The constable testified that in this instance a zero was placed before the number on the summonses issued, while all others issued did not contain such a zero in the usual course of procedure in the justice of the peace court. He further stated that upon checking the docket he found no such cause represented by the numbered summonses. The issuance of the summonses was therefore unlawful, without authority, "under color of his office" and was not part of his official duties. We cannot say his conduct was authorized

by law under the particular circumstances. "Color" legally means an appearance, semblance or an apparent right. Black's Law Dictionary, 4th Ed. defines color of office as follows: "Act unjustly done by the countenance of an office, being grounded upon corruption, to which the office is as a shadow." In our opinion, where an official process is issued unlawfully without the basis or background which makes it legal, it is done under color of the office issuing such a process, and in this case the summonses here clearly were issued under color of the office of the appellant as justice of the peace.

[2] Appellant further claims a variance because the evidence shows the summonses were issued in the name of the Indianapolis Coal and Oil Company as the creditor, whereas the appellant collected an account in the amount of $574.50 due Interstate Ice, Inc., in our opinion there is no variance here, since that is exactly what the indictment alleges, and the evidence conforms to the indictment. It shows that Robert Sexson was President of Interstate Ice, Inc. and Indianapolis Coal and Oil Company; that it was an interlocking corporation, with a large portion of the stock held by the same persons. The evidence contributed by officers of Interstate Ice, Inc. clearly shows that the account was in the name of Michael Maio and in the same sum as alleged, and that Maio testified that he paid the account to Interstate Ice, Inc. after he got the summons entitled "Indianapolis Coal and Oil Company". He knew it was for the same account.

At most we can only say there was some conflict in the evidence, and this was resolved by the trier of the facts. Certainly the appellant was not misled by the allegations in the indictment nor is there any showing that he was harmed in any fashion, since the proof conformed to the charge Smith v. State (1960), 241 Ind. 1, 168 N.E.2d 199; Madison v. State (1955), 234 Ind. 517, 130 N.E.2d 35.

It is apparent from the evidence, as the indictment charges, that the summons in the name of Indianapolis Coal and Oil Company was used to collect the account in the name of Interstate Ice, Inc. The evidence shows that

prior to the issuance of the summons by the appellant, the appellant met with Robert Sexson, President of the Indianapolis Coal and Oil Company, who was also president of Interstate Ice, Inc., in Sexson's office at Indianapolis Coal and Oil Company to discuss the collection of the account referred to in the indictment. The appellant knew that Mr. Sexson was doing business under both names. Maio testified that when the summons was given him he called the Interstate Ice, Inc. Appellant's brief, in summarizing Maio's testimony, states in regard thereto that: "I [Maio] called Interstate Ice and told them, and paid the bill to Interstate Ice and did not appear in court, [and was told when I paid the bill I didn't have to appear]." The evidence is uncontradicted that thereafter appellant received half of the account, namely $287.25 by a check drawn on Interstate Ice, Inc. for services in making the collection. The evidence on count one is sufficient to sustain the judgment.

[3] In regard to count two, that the appellant "did unlawfully engage in the business of collecting claims", there is no evidence in our opinion to sustain the charge of a practice or a business, since the court had before it only one instance of debt collection—that referred to in count one. Snyder v. Heinrichs (1944), 115 Ind.App. 129, 55 N.E.2d 332 and cases therein cited; 93 A.L.R.2d 90; 5A Words and Phrases, "Business" p. 640, et seq. It is well settled in this state that the making of one loan is not a practice of engaging in the lending business that requires a license, nor is making one trip with passengers for pay engaging in the business of a public carrier. The cases are innumerable on this issue. In our opinion, the evidence is insufficient to sustain the conviction of count two.

The judgment of the trial court is affirmed as to Count One and reversed as to Count Two.

HUNTER, *CJ.*, and GIVAN, *J.*, concur.

DEBRULER and JACKSON, *JJ.*, concur in result.

[redacted]

[redacted]

[redacted]

SUBJECT INDEX

	Page
Table of Cases	ii
Opinion Below	1
Questions Presented For Review	1
Rules of Supreme Court, Constitutional and Statutory Provisions	2
Statement of the Case	5
Summary of the Argument	7
Reasons For Denying The Writ	
Argument I	8
Argument II	10
Argument III	12
Argument IV	14
Argument V	16
Conclusion	18

TABLE OF CASES

	Page
Biggs v. State, 201 Ind. 200, 167 N.E. 129, 64 A.L.R. 1085 (1929)	16, 17
Brinegar v. United States, 338 U.S. 160, reh. den. 338 U.S. 839 (1949)	16
Cardinale v. Louisiana, 394 U.S. 437 (1969)	8, 13
Fehlman v. State, 199 Ind. 746, 161 N.E. 8 (1928)	17
Gayer v. State, 247 Ind. 113, 210 N.E.2d 852, reh. den. 247 Ind. 113, 212 N.E.2d 544 (1968)	15
Glasser v. United States, 315 U.S. 60 (1942)	12
Green v. State, 204 Ind. 349, 184 N.E. 183, 87 A.L.R. 1251 (1933)	16
Holt v. United States, 218 U.S. 245 (1910)	16
Lambert v. United States, 261 F.2d 799 (5th Cir. 1958)	12
Mortensen v. United States, 322 U.S. 369 (1944)	12
Riggs v. United States, 280 F.2d 949 (5th Cir. 1960)	12
Street v. New York, 394 U.S. 576 (1969)	8, 13
United States v. Menk, 406 F.2d 124 (7th Cir. 1968)	15
Welty v. State, 180 Ind. 411, 100 N.E. 73 (1912)	17

Page

CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. XIV § 1 4

STATUTES

Burns Ind. Stat. Anno. § 5-1601 ..... 4, 17

Burns Ind. Stat. Anno. § 5-1801 ..... 4, 17

Burns Ind. Stat. Anno. § 10-3729 ..... 5, 17

RULES

Rule 19, United States Supreme Court Rules 2, 10, 12, 13

Rule 23, United States Supreme Court Rules 3, 9

Rule 52, Federal Rules of Criminal Procedure 15

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1381

CLARENCE W. HENDRICKSON,
Petitioner,

vs.

STATE OF INDIANA
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF INDIANA

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion below is reported at 254 N.E. 2d 331 and is found as Appendix A to petitioner's petition.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the issues raised by petitioner were properly raised before the state court so as to preserve the issues for this court on review by certiorari.

2. Whether the issues raised by petitioner were decided by the Supreme Court of Indiana on independent and adequate non-federal grounds.

3. Whether the issues raised by petitioner present a substantial federal question.

4. Whether there was a vital variance between the indictment and the facts upon which petitioner was found guilty.

5. Whether a burden of proof was imposed upon petitioner to show that the conduct in which he had engaged was not illegal.

RULES OF SUPREME COURT, CONSTITUTIONAL AND STATUTORY PROVISIONS

Rule 19, United States Supreme Court Rules:

Considerations governing review on certiorari.

> 1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:
>
> > (a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court.
> >
> > (b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal

question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision.

2. The same general considerations outlined above will control in respect of petitions for writs of certiorari to review judgments of the Court of Claims, of the Court of Customs and Patent Appeals, or of any other court whose determinations are by law reviewable on writ of certiorari.

Rule 23 (1)(f), United States Supreme Court Rules:

23. The Petition For Certiorari

1. The petition for writ of certiorari shall contain . . . —

• • •

(f) If review of the judgment of a state court is sought, the statement of the case shall also specify the stage in the proceedings in the court of first instance and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them (e.g., by a pleading, by request to charge and exceptions, by assignment of error); and the way in which they were passed upon by the court; with such pertinent quotations of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears (e. g., ruling on exception, portion of the court's charge and exception thereto, assignment of errors) as will show that the federal question was timely and properly raised so as to give this court jurisdiction to review the judgment on writ of certiorari.

U.S. Const. amend. XIV § 1:

> ". . . No state shall make or enforce any law . . . nor shall any state deprive any person of life, liberty, or property without due process of law; . . .

Burns Indiana Statutes Annotated, § 5-1601:

> 5-1601. Forms prescribed.—The following forms shall be used by justices as nearly as the circumstances will permit; but no writ or judgment shall be invalid for want of form, if it contain the substance:
>
> • • •
>
> State of Indiana, Clark County, ss:
>
> To any constable of Charlestown Township: You are hereby commanded to summon Richard Roe to appear before me, at my office, on the 1st day of January, 19—, at ten o'clock in the forenoon, to answer John Doe in a complaint wherein he claims the sum of ten dollars and return then and there this writ.
>
> Dated this 20th day of December, 19—.
>
> Richard Stiles, Justice.
>
> [2 R.S. 1852, ch. 1, § 127, p. 449]

Burns Indiana Statutes Annotated, § 5-1801:

> 5-1801. Docket, how kept.—Every justice shall, in a substantial bound book of not less than two hundred [200] pages, keep a docket, in which he shall record the proceedings in full, of all suits instituted before him, which record shall contain the names of the parties at full length, a copy of the cause of action and of the set-off of the defendant, if any, and all proceedings had therein and the amount of the judgment written out in words; and every such record of each cause shall, when completed, be signed by such justice, and the cause noted in

a proper index to be contained in such docket; and every clerk when he shall deliver to any justice his commission shall direct his attention to this section. [2 R. S. 1852, ch. 1, § 18, p. 449.]

Burns Indiana Statutes Annotated, § 10-3729:

10-3729. Justice of peace—Offering or receiving unlawful remuneration prohibited.—It shall be unlawful for any justice of the peace to receive directly or indirectly any remuneration or thing of value from any litigant or any one on behalf of such litigant in any pending cause in his court except for costs and fees provided by law, or to receive any remuneration or thing of value from any one for doing any act under color of his office which act is not a part of his official duties nor authorized by law, and it shall be unlawful for any litigant or any other person in any justice of the peace court to pay, offer to pay, or offer directly or indirectly any remuneration or thing of value to such justice of the peace in connection with any pending litigation, except costs and fees provided by law, or for doing any act under color of his office which act is not a part of his official duties nor authorized by law. [Acts 1957, ch. 256, § 1, p. 586.]

STATEMENT OF THE CASE

Petitioner, hereafter referred to as prisoner, was indicted by the Marion County Grand Jury in two counts. Count one charged prisoner with the unlawful agreement to collect, and the actual collection of, Five Hundred Seventy-Four and 50/100 dollars, court two charged the prisoner with engaging in the business of collecting claims, both counts being contrary to the form of the statute. Prisoner was found guilty on both counts and sentenced

to serve a prison term of one year at the Indiana State Farm and fined $1000 and costs.

Prisoner filed his motion for new trial with the trial court, which reads:

> "Comes now the defendant in the above entitled cause, by counsel and respectfully prays the Court for a new trial hereon on the following grounds and for the following reasons, to wit:
>
> **A. As to Count 1**
>
> 1. Irregularity in the proceedings of the Court and Orders of the Court and abuse of discretion by which said defendant was prevented from having a fair trial, in this, to-wit:
>
> (a) The Court erred in overruling the defendant's Motion to Quash as to Count 1.
>
> 2. The finding of the Court is contrary to law.
>
> 3. The finding of the Court is not sustained by sufficient evidence.
>
> **B. As to Count 2**
>
> Irregularity in the proceedings of the Court and Orders of the Court and abuse of discretion by which said defendant was prevented from having a fair trial in this, to-wit:
>
> (a) The Court erred in overruling the defendant's Motion to Quash as to Count 2.
>
> 2. The finding of the Court is contrary to law.
>
> 3. The finding of the Court is not sustained by sufficient evidence.
>
> WHEREFORE, defendant, Clarence Hendrickson, by Counsel, respectfully prays the Court to grant him a new trial in this cause, including both

BLEED THROUGH POOR COPY

counts herein above set out, and for all other proper relief.

(R. p. 56 l. 1-57 l. 35)

Prisoner's motion for new trial was overruled on February 24, 1969. Subsequently, prisoner assigned as error to the Indiana Supreme Court the overruling of that motion.

On January 22, 1970, the Indiana Supreme Court decided the merits of prisoner's claims in an opinion reported at 254 N.E.2d 331 and found at Appendix A of prisoner's petition. The Indiana Supreme Court affirmed the conviction on count one, unlawfully agreeing to collect a claim, but reversed the conviction on count two, unlawfully engaging in the business of collecting claims. The Court held that there was sufficient evidence for the trier of facts to so find as to count one, but that one collection could not constitute "doing business" so that the evidence was insufficient as to count two. The Court specifically considered prisoner's claim of variance under State Law. No challenge was made to the constitutionality of State variance law under the Fourteenth Amendment. The Court found prisoner's argument to be meritless under State law.

SUMMARY OF THE ARGUMENT

This is not a proper cause for review on certiorari. Prisoner presents two issues for review before this Court, each of which allegedly constitutes a denial to prisoner of his constitutional rights based upon the Due Process Clause of the Fourteenth Amendment. Prisoner's contentions are without merit.

The motion for new trial and the opinion of the Indiana Supreme Court indicate that prisoner has raised the al-

leged unconstitutional deprivation arguments for the first time in his petition for certiorari which is improper and hence does not entitle prisoner to certiorari.

The issues raised by prisoner were decided by the Indiana Supreme Court on independent and adequate non-federal grounds. The issues raised by prisoner present no substantial federal question.

Assuming, *arguendo,* that prisoner has raised some issues directly reviewable by certiorari, prisoner was not denied the due process of law either by a fatal variance between the indictment and the evidence adduced at trial or by the imposition of a burden of proof.

REASONS FOR DENYING THE WRIT

ARGUMENT

I

THE UNCONSTITUTIONAL DEPRIVATION OF DUE PROCESS BY REASON OF AN ALLEGED FATAL VARIANCE OR AN ALLEGED IMPOSITION OF A BURDEN OF PROOF IS NOT PROPERLY BEFORE THIS COURT SINCE IT IS RAISED FOR THE FIRST TIME HERE ON CERTIORARI.

It is well settled that an issue is not properly before this Court where it has not been squarely presented to the state court, either trial or appellate level, for consideration. *Cardinale v. Louisiana,* 394 U. S. 437 (1969); *Street v. New York,* 394 U. S. 576 (1969). Prisoner, in his motion for new trial, contained in the Statement of The Case, *supra,* presented and preserved, as to each count,

the issue that there was an insufficiency of evidence to support the finding and the issue that the finding was contrary to law. Prisoner, in the Argument section of his brief before the Indiana Supreme Court, never once alluded to nor concerned himself with a deprivation of constitutional rights argument. Rather, prisoner presents arguments based purely on standards of evidence shaped by procedural rules of the Indiana Supreme Court. Prisoner's arguments here, without language as to an unconstitutional deprivation, essentially restate the arguments presented to that court. Prisoner now, upon an adverse holding in the Indiana Supreme Court, asserts for the first time that such adverse holding presents due process violations under the Fourteenth Amendment.

Rule 23, United States Supreme Court Rules, requires the following of prisoner in his petition for certiorari:

> (f) If review of the judgment of a state court is sought, the statement of the case shall also specify the stage in the proceedings in the court of first instance and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them (e.g., by a pleading, by request to charge and exceptions, by assignment of error); and the way in which they were passed upon by the court; with such pertinent quotations of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears (e.g., ruling on exception, portion of the court's charge and exception thereto, assignment of errors) as will show that the federal question was timely and properly raised so as to give this court jurisdiction to review the judgement on writ of certiorari.

There is no demonstration that prisoner presented or preserved the unconstitutional deprivation issue at the trial or appellate level of the state court. The Rule specifically requires the prisoner to show how and where the federal question was raised and preserved by specific references to the record and the manner in which it was passed upon by the reviewing court. Prisoner has shown no compliance with either Rule 19, Rules of the United States Supreme Court, or applicable case law.

The unconstitutional deprivation issues raised, therefore, were not properly preserved or presented below and this Court should decline direct review by certiorari.

II

THE DECISION OF THE INDIANA SUPREME COURT IN THIS CASE WAS BASED UPON INDEPENDENT AND ADEQUATE NON-FEDERAL GROUNDS.

The issues presented to the Indiana Supreme Court, as straight sufficiency of the evidence issues, were decided according to the standard established concerning the requirements which evidence presented at trial must meet. The court below discussed the evidence presented relevant to prisoner's claim of a fatal variance and stated:

> "Appellant further claims a variance because the evidence shows the summonses were issued in the name of the Indianapolis Coal and Oil Company as the creditor, whereas the appellant collected an account in the amount of $574.50 due Interstate Ice, Inc. In our opinion there is no variance here, since that is exactly what the indictment alleges, and the evidence conforms to the indictment. It shows that

Robert Sexon was President of Interstate Ice, Inc. and Indianapolis Coal and Oil Company; that it was an interlocking corporation, with a large portion of the stock held by the same persons. The evidence contributed by officers of Interstate Ice, Inc. clearly shows that the account was in the name of Michael Maio and in the same sum as alleged, and that Maio testified that he paid the account to Interstate Ice, Inc. after he got the summons entitled 'Indianapolis Coal and Oil Company'. He knew it was for the same account.

"At most we can only say there was some conflict in the evidence, and this was resolved by the trier of the facts. Certainly the appellant was not misled by the allegations in the indictment nor is there any showing that he was harmed in any fashion, since the proof conformed to the charge. (citations omitted). 254 N.E.2d 331, 334.

As to the issue concerning the alleged imposition of a burden of proof, the court below examined the evidence and, again in light of the sufficient evidence standard, found:

"Appellant argues that his conduct in issuing the summonses was not an act done 'under color of his office which act is not a part of the official duties nor authorized by law'. Of course, the issuance of a summons by a justice of the peace is authorized by law where a complaint is filed or action is initiated. Burns' Ind. Stat. Anno. § 5-301 et seq. In this case the evidence clearly shows that the summonses were issued with no complaint being filed and no cause actually docketed. The summonses issued by the appellant were in furtherance of an unlawful objective and not authorized. The constable testified that in this instance a zero was placed before the number on the summonses issued, while all others

> issued did not contain such a zero in the usual course of procedure in the justice of the peace court. He further stated that upon checking the docket he found no such cause represented by the numbered summonses. The issuance of the summonses was therefore unlawful, without authority, 'under color of his office' and was not part of his official duties." 254 N.E.2d 331, 333.

In dismissing prisoner's contentions, the court below reviewed and found that the evidence presented adequately illuminated the doubts prisoner raised and held that sufficient evidence was presented, not only to resolve any apparent conflict, but to allow the triers of the facts to correctly find prisoner guilty. The sufficiency of evidence standard does not violate any minimal requirements of federal due process, and is, in fact, similar to the standard adopted by the federal system and accepted by this Court. *Riggs v. United States,* 280 F. 2d 949 (5th Cir. 1960); *Glasser v. United States,* 315 U. S. 60 (1942); *Mortensen v. United States,* 322 U. S. 369 (1944); *Lambert v. United States,* 261 F. 2d 799 (5th Cir. 1958). The Indiana Supreme Court decided prisoner's claims upon independent and adequate state grounds which serve a legitimate state interest. This Court should decline direct review of any of the issues by certiorari.

III

THE ISSUES RAISED BY PRISONER PRESENT NO SUBSTANTIAL FEDERAL QUESTIONS FOR THIS COURT TO RESOLVE.

Neither of the issues raised by prisoner presents a special or important reason under Rule 19 for granting

review by certiorari. The claims which prisoner raised before the Indiana Supreme Court were decided on adequate and independent state grounds. The constitutional issues were not raised before the Indiana Supreme Court, are raised for the first time here on appeal and consequently are not properly before this Court. *Cardinale v. Louisiana*, 394 U. S. 437, (1969); *Street v. New York*, 394 U. S. 576, (1969). But even if the issues were 1) properly presented below, and/or 2) not decided on non-federal grounds in the lower court, prisoner does not make any showing as to how he was deprived unconstitutionally of the due process of law. Prisoner cites no authority demonstrating any denial of rights nor any facts or allegations showing that the state court rendered a decision in the manner described in Rule 19.

Rule 19, United States Supreme Court Rules, states:

> "1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:
>
> > (a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court.
> >
> > (b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has

> decided an important question of federal law which has not been, but should be, settled by this court; or has so far departed from the accepted and usual course of judical proceedings, so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision.
>
> 2. The same general considerations outlined above will control in respect of petitions for writs of certiorari to review judgments of the Court of Claims, of the Court of Customs and Patent Appeals, or of any other court whose determinations are by law reviewable on writ of certiorari."

The Indiana Supreme Court decided no question of federal substance or import and nothing was decided contrary to decisions of this Court. No state of federal statute was either interpreted or found to conflict with any decision or interpretation of this Court nor was there a departure from the usual or accepted course of decision-making practiced by the Indiana Supreme Court. In short, prisoner has shown no special or important reason for invoking review by certiorari. This Court should decline review by certiorari.

IV

THERE WAS NO FATAL VARIANCE BETWEEN THE EVIDENCE PRESENTED AT TRIAL AND THE INDICTMENT.

Prisoner claims that, in spite of the decision of the Indiana Supreme Court in this case, there was a fatal variance sufficient to constitute error. The Indiana Supreme Court reviewed the evidence presented and found:

> "Appellant further claims a variance because the evidence shows the summonses were issued in the

> name of the Indianapolis Coal and Oil Company as the creditor, whereas the appellant collected an account in the amount of $574.50 due Interstate Ice, Inc. In our opinion there is no variance here, since that is exactly what the indictment alleges, and the evidence conforms to the indictment. It shows that Robert Sexson was President of Interstate Ice, Inc. and Indianapolis Coal and Oil Company; that it was an interlocking corporation, with a large portion of the stock held by the same persons. The evidence contributed by officers of Interstate Ice, Inc., clearly shows that the account was in the name of Michael Maio and in the same sum as alleged, and that Maio testified that he paid the account to Interstate Ice, Inc. after he got the summons entitled 'Indianapolis Coal and Oil Company'. He knew it was for the same account.
>
> At most we can only say there was some conflict in the evidence, and this was resolved by the trier of the facts. Certainly the appellant was not misled by the allegations in the indictment nor is there any showing that he was harmed in any fashion, since the proof conformed to the charge. (citations omitted) 254 N.E.2d 331, 334.

The Court properly performed its appellate function, viz., review of the record to determine if any harmful error was committed at the trial level concerning those issues presented by prisoner. Federal Rules of Criminal Procedure, Rule 52; *United States v. Menk*, 406 F. 2d 124 (7th Cir. 1968); *Gayer v. State*, 247 Ind. 113, 210 N.E. 2d 852, reh. den. 247 Ind. 113, 212 N.E. 2d 544 (1968). The arguments which prisoner makes in his behalf, that a fatal variance existed, are the same as those which were presented to the Indiana Supreme Court and found to be without merit.

Prisoner's contention presents no issue for this Court to review and this Court should decline review by certiorari.

V

THE BURDEN OF PROOF IS ALWAYS ON THE STATE IN A CRIMINAL PROCEEDING AND NO BURDEN OF PROOF WAS IMPOSED UPON PRISONER.

The burden of proof has always fallen upon the State in prosecuting a charge against a defendant. *Holt v. United States,* 218 U.S. 245 (1910); *Brinegar v. United States,* 338 U.S. 160, reh. den. 338 U.S. 839 (1949); *Biggs v. State,* 201 Ind. 200, 167 N.E. 129, 64 A.L.R. 1085 (1929), *Green v. State,* 204 Ind. 349, 184 N.E. 183, 87 A.L.R. 1251 (1933).

In summary form, count one of the indictment charges prisoner with agreeing to collect certain monies, with issuing process under color of his office to bring the party or parties before the court and, once there, receiving payment, such conduct being contrary to the form of the statute. The Indiana Supreme Court found there was sufficient evidence presented at trial to prove the allegations and to show such conduct was contrary to the statute. The record supports that conclusion.

Prisoner contends that the conduct engaged in was described first as legal and then as illegal. The thrust of prisoner's claim seems to be that the issuance of a summons is the legal act of a judge and cannot be described as either illegal or outside the judge's authority.

Prisoner's contention is correct in that the issuance of process, or summons, is a legal act as provided by 2 R.S.

1852, ch. 1, § 127, as found in Burns' (1968 Repl.) § 5-1601. However, such process shall be entered on the docket as kept by every justice of the peace. 2 R.S. 1852, ch. 1, § 18, as found in Burns' (1968 Repl.) § 5-1801. The evidence presented at trial clearly showed that no docket entry was made and that the issuance numbers on the summonses were not standard. (Tr. p. 139 to p. 153). If docket entries are required of each cause instituted, then the process, not supported by docket entry, must be something less than legal and authorized. The jury and the Indiana Supreme Court so found. The indictment stated that the summonses issued were other than those permitted to be used under authority of Burns' § 5-1601, *supra,* and the evidence so showed.

In addition, the evidence proved, sufficiently, that prisoner was also guilty of violating Acts of 1957, ch. 256, § 1 as found in Burns' (1969 Supp.) § 10-3729.

Prisoner's contention that a burden was imposed upon him is without merit by reason that the State assumed and met the positive burden of proving each allegation. The burden of proof has always been upon the State to so prove and never shifts to the defendant. *Biggs v. State,* 201 Ind. 200, 167 N.E. 129, 64 A.L.R. 1085 (1929), *Fehlman v. State,* 199 Ind. 746, 161 N.E. 8 (1928), *Welty v. State,* 180 Ind. 411, 100 N.E. 73 (1912).

Prisoner, notwithstanding a failure to raise any federal question below for the state courts to consider, has not presented any meritorious issue for the Court to review so that this Court should decline review by certiorari.

CONCLUSION

For the foregoing reasons, the petition for a Writ of Certiorari prayed for in this cause should be denied.

Respectfully submitted,

THEODORE L. SENDAK
Attorney General of Indiana

WILLIAM F. THOMPSON
Assistant Attorney General

EDWARD SQUIER NEAL
Deputy Attorney General

Attorneys for Respondent

Offices of the Attorney General
219 State House
Indianapolis, Indiana 46204
317-633-5512